STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2014
v	No. 313252 Kalamazoo Circuit Court
ERIK DWAYNE BURNEY, Defendant-Appellant.	LC No. 2012-000441-FC

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

The circuit court sitting as the finder of fact convicted defendant of armed robbery, MCL 750.529; possession of a firearm during the commission of a felony, MCL 750.227b(1); felon in possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and possession of marijuana, MCL 333.7403(2)(d). Defendant's convictions arise from an incident during which he stole Robbie Evans' clothes and the belongings he had in his pockets. During the robbery, defendant shot at Evans. Evans testified at defendant's preliminary examination 13 days after the incident. Because Evans was homeless, the prosecutor could not locate him to testify at trial two months later. Defendant challenges the use of Evans' preliminary examination testimony at trial and an investigating officer's testimony about a brief statement made by Evans while reporting the crime. We discern no error and therefore affirm.

I. DUE DILIGENCE

Defendant first contends that the circuit court should not have admitted Evans' preliminary examination testimony at trial because the prosecutor failed to exercise due diligence in searching for the witness. We review for an abuse of discretion a circuit court's determination that the prosecutor exercised due diligence in obtaining the attendance of a witness. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Pursuant to MRE 804(a)(5), a witness is deemed "unavailable" when he or she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." In such circumstances, the proponent of evidence may present "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the

testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(1). See also MCL 768.26 (permitting the admission of preliminary examination testimony at trial when the witness cannot be produced). For the prosecutor in a criminal case to present prior testimony at trial, he or she must show that the prosecution "made a diligent good-faith effort in its attempt to locate a witness for trial." *Bean*, 457 Mich at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id*.

The circuit court conducted a due diligence hearing immediately before trial. At the preliminary examination, Evans apparently informed either the court or the prosecutor that he was staying with friends in the Interfaith Apartment Complex, in Building 1032, Apartment A. Michelle Bennett is a subpoena server for the Kalamazoo police department's detective bureau. She testified that she went to that apartment several times searching for Evans. On one visit, Bennett encountered a juvenile who indicated that Evans probably could be found standing near the curb later in the afternoon. Bennett returned that afternoon but did not find Evans. On another visit, an adult told Bennett that Evans had moved to Gary, Indiana. Bennett also called Evans' cellular telephone. The calls were sent directly to voicemail and the greeting identified "Robbie" as the phone's owner, but Evans did not return Bennett's calls. Bennett then contacted the Michigan and Indiana Secretary of State offices and checked the LEIN system to no avail. Bennett sent out a department-wide email, asking patrol officers to "keep[] an eye out for" Evans.

Rhonda Baxter-Todd is a victim advocate and witness coordinator for the Kalamazoo County prosecutor's office. She also tried to locate Evans to testify at trial. Baxter-Todd testified that she sent several subpoenas to Evans through certified mail at the 1032, Apartment A address. The subpoenas were returned unsigned. Baxter-Todd telephoned Evans multiple times, but he did not return her messages. Baxter-Todd checked court databases for open cases, checked for parking tickets, and searched OTIS, but was unable to locate Evans.

At the close of the hearing testimony, the court ruled that the prosecutor exercised due diligence in attempting to locate Evans by reasonable and good-faith efforts. The court emphasized, "Was every possible avenue taken? Was every possible lead searched? No, certainly not. But that's not what's required." The court therefore admitted Evans' preliminary examination testimony into evidence.

At trial, Kalamazoo public safety officer Timothy Knight testified that, contrary to the address provided at the preliminary examination, Evans stated during his initial police report that he "was homeless but staying with friends" in Building 1062, Apartment C. Based on this testimony, Detective Christina Ellis travelled to the apartment in a last minute effort to find Evans. The apartment was "ransacked or trashed" and appeared to be vacant. Ellis contacted the apartment complex manager, who confirmed that the apartment was vacant and that Evans had never signed a lease for any apartment at the site.

Defendant claims that the prosecutor did not engage in all reasonable efforts to find Evans because she failed to follow up on the lead that Evans had moved to Gary, Indiana and failed to contact a host of other agencies, such as unemployment and the Department of Human

Services. The prosecution must follow up on specific leads. *People v McIntosh*, 389 Mich 82, 87; 204 NW2d 135 (1973). The prosecutor searched for Evans in a reasonable fashion given the conflicting and unreliable information. The prosecutor had no specific information to track down the homeless victim in Gary, Indiana. The individual providing this information gave no forwarding address and did not identify the individuals with whom Evans might be residing. Compare *Bean*, 457 Mich at 686 (in which the police knew the witness had moved to the Washington, D.C. area with his mother because his mother had accepted a job with a government agency, and the officers knew the mother's name). The Gary, Indiana lead may even have been false given the conflicting information that Evans still lived in the area. As Evans was homeless, the prosecutor might have found a lead if she investigated whether Evans was receiving unemployment or social security disability income or some type of state assistance. However, "[d]ue diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982).

Ultimately, the circuit court's determination that the prosecutor employed due diligence fell within the range of reasonable and principled outcomes. Therefore, the court did not err in admitting Evans' preliminary examination testimony under MRE 804.

II. CONFRONTATION

Defendant also challenges the admission of Evans's preliminary examination testimony on confrontation grounds. Defendant claims that he did not have a full and fair opportunity to cross-examine Evans because the purpose of such a hearing is to determine whether probable cause exists to believe that the defendant committed the offenses, not whether the evidence shows guilt beyond a reasonable doubt. We review de novo a preserved challenge based on constitutional confrontation clause grounds. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004), quoting US Const, Am VI; see also Const 1963, art 1, § 20. "The United States Supreme Court has held 'that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact,' . . . but has also held that 'the face-to-face confrontation requirement is not absolute[.]'" *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012) (citation omitted). The Confrontation Clause bars the admission of testimonial hearsay in the absence of the declarant when the declarant is available or the defendant has not had an opportunity to cross-examine the witness. *People v Payne*, 285 Mich App 181, 197; 774 NW2d 714 (2009), citing *Crawford*, 541 US at 68.

Defendant cross-examined Evans at the preliminary examination. He tested Evans' perception of the event and factual assertions about the robbery, sought to discover Evans' criminal history and other possible witnesses, examined Evans' belief that defendant was attempting to kill Evans, and tested Evans' identification of defendant. The Confrontation Clause only provides "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985) (emphasis in original). In

addition, there is no question that cross-examination at a preliminary examination can fulfill the "opportunity" requirement. See *California v Green*, 399 US 149, 165; 90 S Ct 1930; 26 L Ed 2d 489 (1970). Therefore, the admission of Evans's preliminary examination testimony did not violate defendant's right of confrontation.[1]

III. ASSISTANCE OF COUNSEL

Finally, defendant contends that trial counsel was ineffective in failing to object on hearsay grounds to the following colloquy with Officer Knight:

> *Q.* All right. Can you describe the demeanor of the victim?
>
> *A.* Shaken, very scared.
>
> *Q.* What was it that you observed that led you to believe he was shaken and scared?
>
> *A.* Due to the fact that he admitted that he had urinated on himself; that he did not want to be seen out in the courtyard, he wanted to talk to me in private.

Defendant argues that the lack of an immediate objection was prejudicial because the court relied on this information in weighing the credibility of the witnesses:

> When I look at who to believe, Mr. Evans' story makes more sense when put together with all of the other witnesses. . . . It doesn't make sense that a person is going to go to the extreme, if they're going to make up a lie about an incident that it happened, report it to the police, that they would urinate on themselves, and then talk to an officer and be open and tell the officer that.

As defendant did not move for a new trial or for a *Ginther*[2] hearing, our review is limited to errors apparent on the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"'[T]he right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). A defendant's claim of ineffective assistance includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency component, a defendant must show that

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[1] Defendant also contends that live testimony is required for the fact finder to adequately consider the witness's demeanor and credibility. The prosecutor avoided this issue by playing the video recording of Evans' preliminary examination testimony at trial.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant also must overcome the strong presumptions that his "counsel's conduct [fell] within the wide range of reasonable professional assistance," and that counsel's actions were sound trial strategy. *Strickland*, 466 US at 689. "Effective assistance of counsel is presumed," and a "defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Trial counsel was not ineffective for failing to object to Officer Knight's testimony because, even if hearsay, Evans' statement was admissible. MRE 803(3) provides for the admission of statements regardless of the witness's availability regarding "the declarant's then existing . . . physical condition." That Evans had urinated in his pants was a statement about his physical condition. And, as noted by the circuit court, it was a physical condition that Officer Knight could observe and verify.

Evans' statement to Officer Knight also would have been admissible as an excited utterance under MRE 803(2). That provision allows for the admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evans made the statement shortly after the robbery, while he was still "[s]haken and very scared." He did not have "time to contrive and misrepresent" the events. See *People v Gee*, 406 Mich 279, 282; NW2d 278 NW2d 304 (1979).

As Evans' statement to Officer Knight would have been admissible under two separate hearsay exceptions, any objection would have been meritless and counsel was not ineffective for failing to raise it. See *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell